**PUBLIC PROSECUTOR**

**v.**

**LEONG HEO CHEONG**

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL TRIAL NO. 47 (58)-1-86]
25 JULY 1990

***CRIMINAL PROCEDURE:*** *Out of court statements by auxiliary constable now deceased - Whether admissible - Position, powers and duties of deceased - Dual role - Whether prosecution should be allowed to reopen case for purposes of adducing death certificate - Requirements under s. 32 Evidence Act.*

***EVIDENCE:*** *Out of court statements of deceased - Admissibility - Section 32 Evidence Act.*

The accused was charged with the offence of trafficking in 99.8 gms of heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). The issues for determination for the Court were the admissibility of out-of-Court statements (in the form of a police report) and oral statements made by S, an auxiliary police constable who arrested the accused (S was now deceased) and whether accused was a "trafficker"; the accused's defence being that the bag (in which the drugs were found) did not belong to him but one T.

**Held:**

**[1]** It is settled law that if on a crucial part of the case, the prosecution intends to ask the Court to disbelieve the evidence of a witness called for the defence, counsel for the prosecution ought to cross examine that witness, or at any rate, to make it plain, while the witness is in the box, that his evidence is not to be accepted. This principles should be applied even more strongly to an accused person who testifies on his own behalf.

**[2]** On the authorities, the Court refused the application by the prosecution for re-opening of the prosecution's case to adduce in evidence a copy of a certified death certificate of S; however proof of death under s. 32 of the Evidence Act was satisfied through the testimony of other prosecution witnesses.

**[3]** S, when performing police duties was cast in a dual role; on the one hand he was a paid servant of the Penang Port Commission (his employer) but on the other, he was a police officer with the usual police powers and duties but subject to the limits imposed by rules or regulations made pursuant to s. 50 of the Police Act.

**[4]** On the facts of the present case, S owed a specific duty to his employer and a corresponding duty to the relevant authority who appointed him as an auxiliary police constable, to act as he claims he did and to record a report bearing in mind that such report related to his own acts; the arrest of the accused took place within the area of his duties and in effecting that arrest he was acting within the scope of his powers and duties as provided for by the Police Act and the Police (Auxiliary Police) Regulations.

**[5]** Accordingly, the statements by S were admissible under s. 32(b) of the Evidence Act.

**[6]** On the evidence before the Court, the prosecution had failed to discharge its burden of proof beyond reasonable doubt.

*[Accused acquitted and discharged.]*

**Cases referred to:**
*Haw Tua Tau v. PP [1981] CLJ (Rep) 11*
*R v. Hart 23 CAR 202*
*R v. Day 27 CAR 168*
*PP. v. Balfour [1949] MLJ Supp 8*
*Smith v. Blakely [1867] LR 2 QB 326*
*Woolmington v. PP [1935] AC 462*

**Legislation referred to:**
Criminal Procedure Code, s. 425
Dangerous Drugs Act 1952, ss. 2, 37(d),(g), 39B(1)(a), (2)
Evidence Act 1950, s. 32(b)
Penang Port Commission Act 1955, ss. 14, 19
Police Act 1967, ss. 47(2), 50
Police (Auxiliary Police) Regulations 1970, regs. 5(1), (2), 6(1)

*For the public prosecutor - A.C. Fernandis*
*For the accused - S. Asamaley; M/s. Mohideen & Asamaley, Penang*

**JUDGMENT**

**Edgar Joseph Jr J:**

This accused was prosecuted before me upon the following charge:

> That you on 14 July 1985 at about 12.45noon at the entrance of the Penang ferry terminal, in the District of George Town, in the State of Penang, did on your own behalf, traffic in a dangerous drug, to wit, heroin, weighing 99.8 grams, and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act and punishable under s. 39B(2) of the same Act.

The main plank in the case for the prosecution consisted of out of Court statements made by one Sidek, aged 25 years, an auxiliary police constable attached to the Balai Polis, Pelabuhan, George Town, (hereinafter referred to as "Sidek").

These out of Court statements took the form of a police report made about one hour after Sidek had arrested the accused some five years ago and oral statements he had made to the investigating officer ASP Yeap Hooi Pin shortly thereafter, on the same day, when the latter visited the scene of incident.

In those out of Court statements, Sidek claimed that at about 12.45p.m. on 14 July 1985, he was on duty at Pengkalan Raja Tun Uda when he had observed a male Chinese walking towards the ferry, behaving suspiciously and carrying a sling bag in his right hand. Sidek added that this caused him to approach the male Chinese and after disclosing his identity brought the male Chinese to a pondok polis hereby. There, in the presence of two of his colleagues and the male Chinese, he took out of the sling bag some garments, including a track suit, a pair of long trousers and a T shirt, two plastic bags from one of which he discovered a newspaper wrapping in which was a plastic packet containing a substance which he suspected to be heroin. He thereupon arrested the male Chinese.

There was no doubt whatever, and indeed it was freely admitted by the defence, that the male Chinese Sidek arrested that day was the accused. Moreover, DPC Mathuveran (PW1) who was on duty and seated in the pondok concerned actually saw Sidek bring the accused into the pondok. Sidek did so holding the accused by the left shoulder from behind with one of his hands, while the accused carried the sling bag. He added that the accused was shivering and appeared pale.

The evidence of the Government Chemist confirmed Sidek's suspicions that the substance in the newspaper wrapping did contain heroin, in particular, 99.8 gms. of it.

Upon that evidence, relying on the oft quoted case of *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11, which requires me to leave suspended the question of the credibility, reliability and accuracy of recollection of the prosecution witnesses, (save where their evidence is inherently incredible) until after the close of the defence and after the final addresses of Counsel, I had ruled that there was a case to answer.

In his defence, the accused testified on oath, that he was 27 years of age, and that at the time of his arrest he was a mosaic layer and a carpenter by occupation. He was then living in Menglembu, Ipoh.

He recalled that one day prior to his arrest, he had come up to George Town at the behest of a friend, Ah Man, who was employed as a singer at the Merlin Hotel there. Ah Man, he said, had telephoned him suggesting that he take up a mosaic tile laying job which another friend of Ah Man required to be done.

However, on meeting Ah Man at the Merlin Hotel, that evening, he was told that the friend had gone to Johore and would be back only two weeks later. Instead, therefore, of waiting in George Town for his return from Johore, the accused decided to return to Ipoh. He delayed his departure for Ipoh and put up the night in a hotel.

On the next day, he checked out of the hotel and visited the Komtar building of which he had heard so much about. While there, he chanced upon a salesman friend from Ipoh whose nickname was Tai Sai Ngan and who was carrying the sling bag. After some casual conversation, this friend said that he too was going to Ipoh that day, So, after a snack, both boarded a taxi and made for the ferry terminal where they alighted, and walked along a path leading to the ferry. When they approached some stalls to their right, Tai Sai Ngan tapped him on the shoulder saying he wished to buy some cigarettes. They then both walked towards the stalls. Before taking out his wallet, Tai San Ngan placed the bag by the side of the pathway which was congested with pedestrians. The accused added that he stood about three feet from the bag while his friend approached a stall. To illustrate the situation he marked on the sketch plan, P12, the positions where his friend touched him on the shoulder and where he placed the bag on the ground. He also indicated by an arrow on the sketch plan the path his friend took when approaching the stall.

Soon after that, a male Malay (it was common ground this was Sidek) approached him and asked him where he was going. The accused replied he was going to Ipoh. In answer to further questions, the accused said that he worked in Ipoh and that he was waiting for his friend who had gone to the nearby stall at the same time indicating with his hand. However, as the place was crowded then, Tai Sai Ngan was out of sight. Sidek then asked the accused to pick up the sling bag. The accused said that he replied that the sling bag was his friend's and enquired whether anything was the matter but Sidek just asked the accused to follow him at the same time placing his arm on his shoulder. On arrival at the police pondok, the accused was searched but nothing incriminating was recovered from him. However, from the sling bag the accused confirmed that Sidek recovered some clothing, a pair of shoes and a packet containing something.

The accused said that he was questioned by Sidek as to what the packet contained, but he replied that he did not know.

The accused denied that any of the items recovered from the sling bag belonged to him nor indeed had he seen them prior to their being taken out by Sidek in the pondok.

Under cross-examination, he confirmed that this meeting with Tai Sai Ngan was coincidental and so was the fact that the latter was intending to go to Ipoh.

Asked if after his arrest any attempt had been made by members of his family to trace Tai Sai Ngan he replied in the affirmative but added that the attempt was unsuccessful.

It was put to him that Tai Sai Ngan was a fictitious person, but he denied this.

It was also put to him that at the time of his arrest he was carrying the sling bag but this too the accused denied.

He was not, however, challenged by the learned Deputy regarding his evidence that when Sidek first approached him he had told Sidek that he was waiting for Tai Sai Ngan who had gone to one of the stalls, at the same time pointing out the direction. Nor was he challenged regarding his evidence, that he had told Sidek that the sling bag was Tai Sai Ngan's.

Likewise, the accused was not challenged regarding his testimony that at the pondok when the offending exhibit was taken out of the sling bag by Sidek who asked him what it was, he had replied that he did not know.

It is settled law that if on a crucial part of the case, the prosecution intend to ask the Court to disbelieve the evidence of a witness called for the defence, Counsel for the prosecution ought to cross-examine that witness or, at any rate, to make plain, while the witness is in the box, that his evidence is not to be accepted. (See *R v. Hart* 23 CAR 202). I see no reason why the same principle should not apply - indeed apply even more strongly - to an accused person who testifies on his own behalf.

The accused not having called any witnesses the defence closed its case after he had been re-examined.

I then adjourned briefly, on the request of Counsel for the defence, to enable him to prepare some notes for his final address.

When the Court resumed, the learned Deputy applied for leave to re-open his case in order to adduce in evidence a copy of a death certificate of Sidek certified by the registrar of births and deaths.

After hearing submissions on the point, I had, in the exercise of my discretion, refused the application. I shall now state my reasons for that refusal.

Generally, it is a rule of practice though not a rule of law, that all evidence upon which the prosecution intends to rely as probative of the guilt of the accused should be adduced before the close of the case for the prosecution, assuming of course, it is then available to the prosecution.

In the present case, the evidence which the prosecution sought to adduce, namely, a copy of the death certificate of Sidek, certified by the registrar of birth and deaths, which was undoubtedly available to the prosecution *ab initio*, had been inadvertently omitted from its case and, as already noted, no attempt had been made to introduce it until after the defence had closed its case. The materiality of this evidence must, of course, have been obvious to the prosecution right from the start, since the main plank in its case against the accused

consisted of the out of Court statements by Sidek to which I have referred, the admissibility of which depended upon compliance with the requirements of s. 32(b) of the Evidence Act (Revised - 1974), including, of course, the pre-requisite requirement, that Sidek was dead.

In these circumstances, I had a discretion in the matter, to be exercised judicially, that is to say subject to the limits indicated by the authorities.

In *R v. Day* 27 CAR 168 after the defence of a defendant charged with forgery and obtaining money by a forged instrument had been closed the Judge adjourned the case and allowed the prosecution, to call a handwriting expert. Specimens of the defendant's admitted handwriting had been in the possession of the prosecution from the beginning of the proceedings. Apart from this evidence the prosecution case rested on the uncorroborated testimony of an accomplice. It was held, quashing the conviction, that the evidence of the expert was not evidence on any matter which arose ex improviso. It was evidence, the necessity for which was obvious and which remedied an obvious defect in the prosecution case. It related to a branch of the case on which the prosecution must have realised that positive evidence ought to be given. Without the further evidence, it was probable that the jury would have acquitted.

*R v. Day* (*ibid.*) was followed locally in the Court of Appeal case of *PP. v. Balfour* [1949] MLJ (Supplement) 8.

I should, perhaps, add that I was well aware that in a criminal trial, the presiding Judge has the right to call a witness not called by either the prosecution or the defence and even without the consent of either if in his opinion this course is necessary in the interest of justice. (See s. 425 of the Criminal Procedure Code). However, as pointed out in Balfour, this power should be exercise in only rare cases, as for instance, where one side has raised at the trial a point which the other side could not have foreseen.

In the circumstances, after hearing submissions on the point, in the exercise of my discretion, I refused the application by the prosecution and I also declined to exercise my powers under s. 425.

I must now turn to examine the merits of the case but before I do so, I wish to make it plain that looking back I am satisfied that the prosecution had established the fact of Sidek's death even without the aid of any death certificate, having regard to the testimony of DPC Mathuveran (PW1), Sgt. Major Majid (PW2), and Woman Constable Aini (PW3), all of whom were colleagues of the accused, and who testified, without challenge, that Sidek had died before the trial commenced. Indeed, Sgt. Major Majid, who was the immediate superior of Sidek, had testified that the latter had died on 14 June 1989. The pre-requisite requirement of proof of death under s. 32 was therefore satisfied by the prosecution.

The defence also contended that the further requirement under s. 32(b) that the statement concerned must have been made in the ordinary course of duty, had not been satisfied by the prosecution because Sidek, not being an anti-narcotics officer, the making of a police report, alleging that he had arrested someone carrying a bag containing drugs and his subsequent oral statements to the investigating officer to the like effect, could not be said to be an act done in the ordinary course of duty.

The first point to note as regards this part of the case is the position, powers and duties of Sidek.

I have, at the outset, mentioned that Sidek was an auxiliary police constable. More specifically, being a constable, he was a junior police officer appointed as such by a commanding officer or any authorised police officer by virtue of s. 47(2) of the Police Act 1967. As such, his duties, powers, and privileges and the area within which they might be exercised were prescribed by the Yang di Pertuan Agong by rules or regulations made pursuant to s. 50 of the Police Act.

Furthermore, by reg. 5(1) and (2) of the Police (Auxiliary Police) Regulations 1970, made pursuant to s. 50 of the Police Act a member of the Auxiliary Police when performing police duties shall have the same powers and duties and shall be subject to the same authority and discipline as a police officer of corresponding rank. This is an important point to note in the context of the question now under discussion.

However, at the same time, Sidek was a salaried servant of a statutory body, to wit, the Penang Port Commission by reason of s. 14 of the Penang Port Commission Act 1955, (Revised 1974) ("PPCA"). As such, he was deemed a public servant within the meaning of the Penal Code (s. 19 of the PPCA).

Indeed, the position of a person like Sidek who was under the employment of the Penang Commission and who was at the same time, appointed as an auxiliary police constable to perform police duties in an area under the control of the Penang Port Commission, is clearly envisaged and specifically provided for by reg. 6(1) of the Police (Auxiliary Police) Regulations 1970.

Thus, Sidek was, when performing police duties, cast in a dual role. On the one hand, he was a paid servant of the Penang Port Commission (his employer) but, on the other, he was a police officer with the usual police powers and duties but subject to the limits imposed by rules or regulations made pursuant to s. 50 of the Police Act.

In my view, that being the status and position of Sidek when on duty as an auxiliary police constable and given the particular circumstances of the present case, he owed a specific duty to his employer the Penang Port Commission and a corresponding duty to the relevant authority who appointed him as an auxiliary police constable, to act as he claims he did, and to record a report bearing in mind that such report related to his own acts. As Blackburn J put it in *Smith v. Blakely* [1867] LR 2 QB 326 at p. 557. "The duty must be to do the very thing to which the entry relates and then to make a report and record it." Similarly, in my view, he was under a duty to submit to the interview by the investigating officer regarding the arrest of the accused.

To take the point a little further, although Sidek was at the material time a mere auxiliary police constable attached to the Balai Polis Pelabuhan, George Town, whose duties were presumably confined to the Port Area, the arrest of the accused took place within that area, and therefore in effecting that arrest, he was acting within the scope of his powers and duties as provided for by the Police Act and the Police (Auxiliary Police) Regulations. The subsequent making of the report and submitting to the interview by the investigating officer were merely consequential to that arrest. I was therefore satisfied that the prosecution had also satisfied the further requirement under s. 32(b) that the statement concerned must have been made in the ordinary course of duty. Accordingly, the statements by Sidek, which took the form of Police Report 221/85 pasted in P15 and his verbal statements made to ASP Yeap Hooi Pin on 14 July 1985, concerning the alleged circumstances under which he had arrested the accused were admissible under s. 32(b).

I must now confront the issue of critical substance at the close of the case for the defence. Had it been proved by the prosecution that at the time and place mentioned in the charge the accused was caught red-handed carrying the sling bag containing the heroin? If so, in the absence of any acceptable explanation, he would be a trafficker within the meaning of s. 2 of the Dangerous Drugs. Act.

It was submitted by the learned Deputy that the defence of the accused was a bare denial and therefore insufficient to rebut the presumptions under s. 37(d) (as to knowledge) and (g) (as to trafficking) of the Act.

In my view, it was not quite correct to describe the defence of the accused as a bare denial; it was a denial coupled with an explanation. Nevertheless, it was true to say that there was an acute conflict of evidence between Sidek's version as to the circumstances under which the accused was arrested and that of the accused.

The only evidence in the prosecution case that **at the time the accused was stopped by Sidek,** he was carrying the sling bag with the heroin in it consisted of the out of Court and unsworn statements aforesaid by Sidek himself. This was, as I said at the outset, the main plank in the case for the prosecution. It is true to say, however, that there was also the testimony of DPC Muthuveran, about Sidek bringing in the accused by the shoulder to the Police Pondok at the Balai Polis Pelabuhan. There was also this witness's evidence that the accused was then carrying the sling bag. This evidence was never in dispute. Indeed, the accused admitted as much adding that he had lifted the sling bag from the ground where it had been left by Tai Sai Ngan and carried it at the behest of Sidek. It was stressed by Counsel for the defence that this evidence was consistent with the innocence of the accused, because the accused made no attempt to escape, after being stopped by Sidek who was on duty alone, although he could easily have done so, since he was not handcuffed and he had been stopped in a busy area crowded with pedestrians. I agree that the testimony of DPC Mathuveran was, in the circumstances, of little value since it was equally consistent with Sidek's statements and the defence of the accused.

As for the testimony of DPC Mathuraven that the accused was pale and shivering, evidence of this kind is often, by itself, of little value and can be prejudicial to an accused, since an innocent person who has been picked up by the police may react in the same way. Its value must depend upon the particular circumstances of each case. In the present case, evidence of the demeanour of the accused (even if true) would to be weighed against the important fact that he made no difficulties when taken to Balai Polis Pelabuhan even though he could have escaped, an indication that he might have had no knowledge of the heroin in the sling bag.

In these circumstances, my decision depended upon the credibility of Sidek on the one hand (who I had not had the advantage of seeing) and the credibility of the accused on the other (who testified under oath).

It is right to say at the risk of being trite, that in criminal cases, especially where an accused is being tried for his life, a witness who is to testify against him should give evidence before the Court trying him, thus affording an opportunity to the Court to see the witness and observe his demeanour and so to make a better assessment of his credibility and reliability than is possible from a mere reading of his out of Court statements.

It was stressed by the learned Deputy that the statements by Sidek were contemporaneous in nature and that he had no motive to fabricate a case against the accused. The fact remained, as Counsel for the defence replied, that Sidek might have been mistaken in his observation, since the area was crowded with pedestrians and, in such a situation, he might have thought he saw the accused carrying the sling bag when it was really Tai Sai Ngan who, it was said, was of similar build and height as the accused. There was also the unchallenged evidence of the accused that immediately upon being questioned by Sidek about the sling bag he had indicated that it was his friend's and that he was waiting for his friend who had gone to a nearby stall.

These were, of course, very serious questions which the defence were raising, and there was no means of testing by cross-examination the veracity or accuracy of Sidek's statements in the light of these questions.

On the other hand, the version of the accused was subjected to searching cross-examination by the learned Deputy from which he emerged unbroken and unshaken. The accused, I noted, gave his evidence in a straight forward manner showing no signs of embarrassment under cross-examination.

In the circumstances, what right have I to say that the defence story is unreasonable? If it is not inconsistent with the proved facts, a rejection of it would be simply and solely upon the ground that it was told by an accused person under trial.

At the end of the day, I reminded myself that whatever the infirmities there may have been in the defence, the case for the prosecution had to stand or fall according to its own strength or weakness, since the legal burden of proof as regards the claim that the accused was carrying the sling bag with the heroin in it, at the time he was stopped by Sidek, lay upon the prosecution throughout the trial. (See *Woolmington v. PP* [1935] AC 462. This burden, I was amply satisfied, the prosecution had failed to discharge beyond reasonable doubt.

In the result, I found the accused not guilty of the offence charged and I acquitted and discharged him of the same. I also made the usual order regarding the disposal of the exhibits.

Also found at [1990] 2 CLJ 818